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No. 91-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WEST FARMS ASSOCIATES,

Petitioner,

v.

STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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REPLY OF PETITIONER

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STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, *et al.*,

Respondents.

PETITIONER'S REPLY TO RESPONDENT WILMORITE, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 15.6 of the Supreme Court Rules, SUP. CT. R. 15.6, Petitioner West Farms Associates hereby respectfully replies to Respondent Wilmorite, Inc.'s Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit ("*Brief in Opposition*"). Wilmorite's Brief in Opposition (1) misrepresents the full extent of the record in this case; (2) urges an incorrect interpretation of the STC's obligations under CEPA; (3) challenges the jurisdiction of the Supreme Court while contending that West Farms has no right of appeal to the state court; and (4) seeks to limit this Court to a purely superficial examination of the court of appeals' opinion. The Brief in Opposition at-

tempts to obscure the facts that have led West Farms to seek its remedy of last resort from this Court.

I. *The STC's September 5, 1991 Meeting Was Part of the Record Before the Court of Appeals and the Minutes of that Meeting Identify No Evidence to Rebut West Farms'* Prima Facie *Showing of Environmental Harm*

Contrary to Wilmorite's contention, *Brief in Opposition* at 3-4, the events of the September 5, 1991 meeting of the STC were made part of the record before the court below. On September 18, 1991, West Farms' counsel transmitted to the court of appeals for filing an affidavit supplementing its authorities and notifying the court of the meeting, the approval of Wilmorite's Certificate application, and the STC's refusal to receive testimony or evidence with respect to West Farms' environmental concerns. Affidavit of Neil T. Proto Setting Forth Supplemental Authorities Since Submission of Briefs, September 18, 1991, App.. *infra,* at 1a.

West Farms formally requested from the STC a copy of its official minutes of its September 5, 1991 meeting ("Minutes"). As the transmittal letter reveals, Respondent STC did not send those Minutes to West Farms until September 23, 1991—almost three weeks after the meeting and only one day prior to the scheduled oral argument.

The minutes of the STC's formal meetings constitute the official record of actions taken by that agency. *Petition for Writ of Certiorari* at 45a ("*Petition*"). Thus, the Minutes provide the only record of the STC's decision making process with respect to the consideration and disposition of

Wilmorite's Certificate application.[1] In West Farms' view, this record was necessary to proper analysis of the agency's conduct under the Connecticut Environmental Protection Act, CONN. GEN. STAT. ANN. §§ 22a-14—22a-20 (West 1985) ("CEPA"). Accordingly, West Farms perfected the record for appeal as effectively as possible under the circumstances. In view of Respondent STC's failure timely to make a record of the proceedings available prior to oral argument, the respondents should not now be heard to complain about the facts in the record.

II. *The Mandatory Duty of Section 22a-19 of CEPA Is Within The Jurisdiction of the STC*

Citing *Connecticut Water Co. v. Beausoleil,* 204 Conn. 38, 526 A.2d 1329 (1984), Wilmorite asserts that West Farms' environmental allegations are outside the scope of STC jurisdiction. *Brief in Opposition* at 10-12. These arguments are flatly inconsistent with the text of Section 22a-19 and the entire statutory scheme of CEPA. They also misinterpret the cases on this point.

Specifically, Wilmorite can draw no comfort from *Middletown v. Hartford Electric Light Co.,* 192 Conn. 591, 473 A.2d 787 (1984), and *Connecticut Fund for*

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[1] Wilmorite's claim that the record contained "significant and substantial" evidence rebutting West Farms' allegations is without merit. The Minutes make absolutely no reference to any of Wilmorite's asserted environmental evidence that might rebut West Farms' claims. In fact, the record provides no indication that the agency considered any environmental evidence at all in reaching its decision. *See Minutes Special Meeting, State Traffic Commission,* September 5, 1991, *reprinted in, Petition for Writ of Certiorari* at 48a-49a (remarks of Commissioners Frankel and Cioffi).

the Environment, Inc. v. Stamford, 192 Conn. 247, 470 A.2d 1214 (1984). In *Beausoleil,* a later case, the Connecticut Supreme Court explained that

> [i]n *Middletown v. Hartford Electric Light Co.* . . . and *Connecticut Fund for the Environment, Inc. v. Stamford,* . . . we recognized that General Statutes § 22a-19 does *not* expand the jurisdictional authority of an administrative body acting pursuant to a separate act of title 22a, but rather, limits an intervenor to the raising of those environmental matters which impact on the particular subject of the act pursuant to which the commissioner is acting.

Beausoleil, 204 Conn. at 46, 526 A.2d at 1334 (emphasis added, citations omitted). Thus, the jurisdictional limitation urged by Wilmorite clearly applies only to agencies (like the inland-wetland agency in *Middletown* and the Stamford Environmental Protection Board in *Connecticut Fund for the Environment*) created under Connecticut's environmental statutes and assigned specific environmental responsibilities by those statutes. As Wilmorite concedes, the STC is not a creature of Title 22a of the Connecticut General Statutes. Accordingly, it is subject to the mandatory duty imposed by Section 22a-19. CONN. GEN. STAT. ANN. § 22a-19 (West 1985).

III. *West Farms' State Court Action Will Not Remedy the Federal Constitutional Defects in the STC's Disposition of Wilmorite's Certificate Application*

Wilmorite's contention that "alternative state court procedures are available to West Farms," and that this Court should take judicial notice of West Farms'

state court appeal of the STC's grant of the disputed Certificate, *Brief in Opposition* at 13, is both disingenuous and hypocritical in view of its later contention that Section 22a-19 does not provide a right to appeal from actions of the STC. *Id.* at 16-17. Thus, its argument is that no judicial forum exists. Wilmorite urges this Court to deny West Farms a remedy in deference to a purported state remedy which Wilmorite simultaneously contends is unavailable.

Moreover, despite Wilmorite's claim to the contrary, West Farms' state court Appeal From Final Decision is based only upon violations of state law—specifically, the Connecticut Administrative Procedures Act, CONN. GEN. STAT. §§ 4-167, 4-177, 4-178, and 4-179 and other statutes. It does not raise the federal constitutional question now before this Court. The term "due process," in the broad sense that it is used in the state appeal, does not carry talismanic force to bring before the Connecticut court a federal claim nowhere referenced in the pleading.

Stripped of its verbiage, Wilmorite is arguing for some form of abstention. Neither court below accepted this argument. Should the Court find Wilmorite's argument in this regard persuasive, the appropriate course would be to hold disposition on the Petition pending decision by the state court in order to determine that the Federal constitutional defect, although not explicitly raised, has been properly resolved.

IV. *The Public Trust Doctrine Is Properly Before This Court*

Finally, Wilmorite asserts that West Farms did not raise before the court of appeals the effect of the

Public Trust Doctrine on the proper interpretation of Section 22a-19. *Brief in Opposition* at 15. Wilmorite further avers that the Doctrine has no application here because certain of its terms are not clearly defined. *Id.* at 16.

First, throughout this proceeding, West Farms has asserted rights based, *inter alia,* on the mandatory language of Section 22a-19 of CEPA. CEPA is explicitly based on the Public Trust Doctrine. Its text, purpose and history clearly so provide. *See* CONN. GEN. STAT. ANN. §§ 22a-15, 22a-16, 22a-17(a), 22a-18, 22a-18(a), 22a-18(b), 22a-18(c), 22a-19, 22a-19(a), 22a-19(b), and 22a-19a. Analysis of West Farms' claim required the court below to evaluate the statute and its purpose against the standards articulated by this Court in *Hewitt v. Helms,* 459 U.S. 460 (1983) and its companion cases. It did so; and, in the process, resolved a critical issue (*i.e.,* who benefits from CEPA's enforcement) based on its understanding of the Public Trust Doctrine. It concluded, incorrectly, that CEPA's beneficiaries are the public generally, which precludes any individualized entitlement, *cf. Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982), such as West Farms'. *West Farms Associates v. State Traffic Comm'n,* No. 91-7460 (2nd Cir. Dec. 3, 1991), *reprinted in, Petition* at 6a. In view of these facts, it is difficult to imagine how any court reading the statute even casually could overlook such a central doctrine. The court of appeals certainly did not.[2]

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[2] Wilmorite's suggestion that the terms "public trust" and "other natural resources" have not been defined or interpreted is plainly wrong. The Public Trust Doctrine has a rich history in this Court's cases and in legal scholarship that provides relevant standards for determining the contours of the phrase

Second, even assuming, *arguendo,* the issue was not raised below, this Court has stated repeatedly that it reviews judgments, not opinions. *Fed. Communications Comm'n v. Pacifica Found.,* 438 U.S. 726 (1978); *Black v. Cutter Laboratories,* 351 U.S. 298 (1956); *accord Hyatt v. Sullivan,* 899 F.2d 329 (4th Cir. 1990); *see also Vance v. Terrazas,* 444 U.S. 252, 258 n.5 (1980) and cases cited therein. Accordingly, in formulating its analysis in any particular case, the Court is free to consider rationales only implicitly considered or employed by the court of appeals.

CONCLUSION

For the foregoing reasons, Respondent Wilmorite's arguments in opposition to the Petition are without merit. Accordingly, the writ of certiorari should be granted.

"public trust." *See Illinois Cent. R.R. v. Illinois,* 146 U.S. 387 (1892); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471 (1970). Likewise, the Connecticut Supreme Court has articulated an analysis giving meaning to the phrase "other natural resources." *See Red Hill Coalition v. Town Plan and Zoning Comm'n,* 212 Conn. 727, 563 A.2d 1347 (1989). Moreover, CEPA also declares "that there is a public trust in the air," a resource of unambiguous character. CONN. GEN. STAT. ANN. § 22a-15; *cf.* § 22a-19(b); *see also Manchester Envtl. Coalition v. Stockton,* 184 Conn. 51, 441 A.2d 68 (1981) (recognizing air pollution, like that alleged by West Farms, as an injury to the public trust in air).

Respectfully submitted,

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APPENDIX

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September 18, 1991

VIA FEDERAL EXPRESS

Elaine B. Goldsmith
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United States Court of Appeals
for the Second Circuit
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40 Foley Square
New York, NY 10007

Re: West Farms Associates, Plaintiff-Appellant v. State Traffic Commission, et al., Defendants-Appellees, Case No. 91-7460

Dear Ms. Goldsmith:

Enclosed please find for filing the original and nine copies of the Affidavit of Neil T. Proto Setting Forth Supplemental Authorities Since Submission Of Briefs pursuant to Rule 28j of the Federal Rules of Appellate Procedure.

If you have any questions, please do not hesitate to call.

Thank you for your assistance in this matter.

Sincerely,

/s/ Neil T. Proto
Neil T. Proto

Enclosures

91-7460

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WEST FARMS ASSOCIATES,
Plaintiff-Appellant,

v.

STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, EMIL H. FRANKEL AND J. WILLIAM BURNS, INDIVIDUALLY AND AS A MEMBER OF THE STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, NICHOLAS A. CIOFFI AND BERNARD R. SULLIVAN, INDIVIDUALLY AND AS A MEMBER OF THE STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, LOUIS S. GOLDBERG AND LAWRENCE F. DELPONTE, INDIVIDUALLY AND AS A MEMBER OF THE STATE TRAFFIC COMMISSION OF THE STATE OF CONNECTICUT, DEPARTMENT OF TRANSPORTATION OF THE STATE OF CONNECTICUT, AND WILMORITE, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

AFFIDAVIT OF NEIL T. PROTO SETTING FORTH SUPPLEMENTAL AUTHORITIES SINCE SUBMISSION OF BRIEFS

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91-7460

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 91-7460

WEST FARMS ASSOCIATES,
Plaintiff-Appellant,

v.

STATE TRAFFIC COMMISSION, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

AFFIDAVIT OF NEIL T. PROTO SETTING FORTH SUPPLEMENTAL AUTHORITIES SINCE SUBMISSION OF BRIEFS

I, Neil T. Proto, being duly sworn, do on oath depose and say:

1. I am the attorney of record representing West Farms Associates, Plaintiff-Appellant in the above-entitled matter, and a member of the bar of this Court. I am submitting this Affidavit setting forth supplemental authorities pursuant to F.R.A.P. 28(j).

2. Briefs on the merits of this matter were completed on August 6, 1991 and oral argument has been set for September 24, 1991.

3. West Farms stated in its Opening and Reply Briefs that (i) the STC does not hold a "hearing"; it holds a "meeting" (Opening Br. 17, 25; Reply Br. 4, n.3); and (ii)

the Attorney General's Office takes the position that because such STC meetings are not hearings, there is no right to appeal under Conn. Gen. Stat. Section 4-183 or any other state statute (Opening Br. 8-9; Reply Br. 21, n.12).

4. On January 6, 1991, in an unreported opinion, the Superior Court in Connecticut rendered a decision in *Town of Southington v. State Traffic Commission*, 1991 Conn. Super LEXIS 102 (1991), wherein it held, among other things, that unless a formal hearing is held, there is no right to appeal a decision of the State Traffic Commission (STC) under Conn. Gen. Stat. Section 4-183. Counsel for West Farms only recently became aware of the significance of this decision following the submission in this case of the Affidavit of Attorney George Finlayson described below.

5. In his Affidavit of August 29, 1991 to this Court, Assistant Attorney General George Finlayson, who represents the State Defendants in the above-entitled matter, stated that:

> Any final decision of the Connecticut State Traffic Commission may be appealed to the Superior Court by an aggrieved person pursuant to Conn. Gen. Stat. 14-311(e) and Conn. Gen. Stat. 4-183.

6. The District Court below stated that the STC would hold a hearing on West Farms' environmental concerns (Opening Br. 25). On September 5, 1991, the STC met and granted Wilmorite's Application for a Traffic Certificate. When asked at that proceeding by the undersigned, the STC Chairman, Commissioner Emil Frankel, stated that the STC was holding a meeting and not a hearing. West Farms was not allowed to submit information or testimony on its environmental concerns at the STC meeting.

7. The foregoing is true to the best of my knowledge and belief.

Dated this 18th day of September, 1991.

/s/ Neil T. Proto
Neil T. Proto
Counsel for West Farms Associates

Sworn and subscribed to before me this 18th day of September, 1991.

/s/Beverly A. Taylor
Notary Public

My Commission Expires:
February 14, 1992